No. 88-2122 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

KATHLEEN MARIE EHRSAM,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Commonwealth of Pennsylvania's Mandatory Minimum Sentencing Act, which provides a minimum, but not a maximum, penalty for certain offenses committed with a gun and requires notice to be given to the defendant before sentencing of the prosecutor's intention to invoke minimum mandatory sentence, violates the due process clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Statement of the Case 2

A. Factual History 2

B. Procedural History 3

Reasons for Denying the Writ 6

I. The Commonwealth of Pennsylvania's Mandatory Minimum Sentencing Act, which provides a minimum, but not a maximum, penalty for certain offenses committed with a gun and requires notice to be given to the defendant before sentencing of the prosecutor's intention to invoke minimum mandatory sentence, does not violate the due process clause of the Fourteenth Amendment to the United States Constitution. 6

Conclusion 12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Columbia Broadcasting Sup., Inc. v. Democratic National Comm., 412 U.S. 94, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) 11

Commonwealth v. Bryant, 239 Pa. Super. 153, 361 A.2d 350 (1976) 11

Commonwealth v. Cooke, 342 Pa. Super. 58, 492 A.2d 93 (1985) 7

Commonwealth v. Ehrsam, 355 Pa. Super. 40, 512 A.2d 1199 (1986) 4

Commonwealth v. Hernandez, 339 Pa. Super. 32, 488 A.2d 293 (1985) 8

Commonwealth v. Lutz, 508 Pa. 297, 495 A.2d 928 (1985) 9

Commonwealth v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (1986) 8, 9

Commonwealth v. Pittman, 528 A.2d 138 (Pa. 1987) 8, 9

Commonwealth v. Wright, 494 A.2d 354 (Pa. 1985) 6

Garner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) 10

Contents

Page

McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 (1986) 6, 8, 11

Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980) 11

Snider v. Thornbush, 496 Pa. 159, 436 A.2d 593 (1987) 11

United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) 9

United States v. Belgard, 694 F. Supp. 1488 (D. Or. 1988) 10, 11

Woodson v. North Carolina, 428 U.S. 297 (1987) 8

Statutes Cited:

1 Pa. C.S. §§ 1921 and 1922 10

42 Pa. C.S. § 9712 ..... 6, 8

United States Constitution Cited:

Fourteenth Amendment 5, 6

Rule Cited:

Supreme Court Rule 17-1(c) 7

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BRIEF IN OPPOSITION FOR RESPONDENT

The respondent, Alan M. Rubenstein, District Attorney for Bucks County, Pennsylvania, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Pennsylvania's denial of petition for allowance of appeal dated April 27, 1983.

STATEMENT OF THE CASE

A. Factual History

On July 3, 1983, Andrew Woehrel was shot by petitioner, Kathleen Marie Ehrsam at a house petitioner rented from Mr. Woehrel. The property which was located in Kintnersville, Bucks County, Pennsylvania had been rented to petitioner and her husband, Edwin Ehrsam, and their family for approximately one year prior to the events leading to petitioner's conviction. The Ehrsam's had fallen behind in their rent payments and had been advised by Woehrel in May, 1983 that he wanted them to vacate the premises so new tenants could move in by July, 1983. The Ehrsam's informed Mr. Woehrel that they would vacate the premises by July 1, 1983. The Ehrsam's did not leave the premises by this date, so Mr. Woehrel offered to help them move out. Mr. Woehrel never received a response to his offer from the Ehrsam's.

On July 3, 1983, Mr. Woehrel drove to the Ehrsam's house to discuss the situation. An argument ensued between Woehrel, Edwin Ehrsam, and petitioner. The Ehrsam's advised Woehrel they would not leave voluntarily and Woehrel would have to evict them. Woehrel responded by offering to assist the Ehrsam's financially, and would permit them to camp on another property he owned. Edwin Ehrsam promised to get back to him with a response to that offer later that day.

Several hours later, Woehrel asked his son, Mark, and Mark's friend, Paul McBride, to stop by the petitioner's to see whether or not they had decided to leave. When he arrived, Mark discussed the situation with petitioner's husband. Petitioner then accosted Mark and Paul and threatened to shoot if they did not get off the porch.

In the meantime, Woehrel had asked a friend, Vic Jones, to accompany him to the Ehrsam's. Woehrel wanted Vic Jones to impersonate a prospective tenant for the property the Ehrsam's were currently living in. Although Jones refused to do this, he did agree to go with Woehrel to discuss the situation with the Ehrsam's again and to offer them the use of his van in moving.

Woehrel and Jones drove to the petitioner's in Woehrel's car and parked it in front of the house. Jones got out of the car, knocked on the door and yelled "hey, what are you doing?" He then ran to the car holding a shotgun which he threw into the back seat. Petitioner and her husband were on the porch of the house. A scuffle ensued in which petitioner and her husband attacked Jones in an attempt to regain the shotgun. Woehrel then observed a third person, later identified as petitioner's brother, Ted Praul, point a .22 rifle out of a window and shoot at the car tires. Praul then left the house and threatened to blow Woehrel's head off if the shotgun wasn't returned. Petitioner then took the shotgun into the house. At this time, Woehrel got out of the car to help Jones. As he approached the house, petitioner came out of the house onto the porch pointing the .22 rifle at Woehrel. Petitioner threatened to shoot Woehrel and then without further warning shot him, causing him to fall to the ground and scream "oh, I'm shot, Vic, I'm shot".

The result of the gunshot wound paralyzed Woehrel from the waist down and necessitated lengthy hospitalization and rehabilitation treatments.

B. Procedural History

Petitioner was charged with attempted homicide, aggravated assault, simple assault, recklessly endangering another person and possession of an instrument of crime. Following the preliminary hearing, at which the charges were held for court, the petitioner

was arraigned. Petitioner filed omnibus pretrial motions as well as supplemental omnibus pretrial motions. Additionally, petitioner had a pretrial hearing on those motions at which time the court dismissed said motions.

On December 12, 1983, the petitioner was tried by a jury before the Honorable Leonard B. Sokolove. The jury, on December 15, 1983, found petitioner guilty of aggravated assault, simple assault, recklessly endangering another person, and possession of an instrument of crime. Subsequently, trial defense counsel filed post verdict motions on December 27, 1983. The petitioner's motions for a new trial on arrest of judgment were denied in an opinion and order on April 4, 1985.

On May 17, 1985, petitioner was sentenced to five to ten years in a penal institution for the Commonwealth of Pennsylvania. On May 23, 1985 a motion for reconsideration of sentence was filed. This motion was denied on June 11, 1985.

Petitioner filed an appeal to the Superior Court of Pennsylvania on May 23, 1985. On July 9, 1986, the Superior Court of Pennsylvania affirmed the judgment of the trial court. *Commonwealth v. Ehrsam,* 355 Pa. Super. 40, 512 A.2d 1199 (1986).

On August 5, 1986, petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. This petition was denied by the Supreme Court of Pennsylvania on February 2, 1987.

On February 24, 1987, petitioner filed to the Supreme Court of Pennsylvania for reconsideration of the denial of the petition for allowance of appeal. Petitioner's application for reconsideration was denied by the Supreme Court of Pennsylvania on April 27, 1987.

On August 7, 1987, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. On May 3, 1988, Judge Muir denied petitioner's petition for writ of habeas corpus citing as his reasons that petitioner's petition contained claims which had not been previously exhausted through available state judicial remedies.

On July 13, 1988, petitioner filed a petition for relief pursuant to Pennsylvania's Post Conviction Hearing Act, in the Court of Common Pleas of Bucks County, Pennsylvania. In this petition, petitioner requested the right to file a petition for allowance of appeal to the Supreme Court of Pennsylvania *nunc pro tunc.*

On July 29, 1988 Judge Sokolove granted petitioner the right to file the petition for allowance of appeal *nunc pro tunc.*

On August 26, 1988 petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. Petitioner raised the following issue: whether Pennsylvania's Mandatory Minimum Sentencing Act violated the due process clause of the Fourteenth Amendment to the United States Constitution.

On April 27, 1989, the Pennsylvania Supreme Court denied the petition for allowance of appeal. It is from that order that petitioner seeks a writ of certiorari.

This is the respondent's brief in opposition to the petition for writ of certiorari.

REASON FOR DENYING THE WRIT

I.

The Commonwealth of Pennsylvania's Mandatory Minimum Sentencing Act, which provides a minimum, but not a maximum, penalty for certain offenses committed with a gun and requires notice to be given to the defendant before sentencing of the prosecutor's intention to invoke minimum mandatory sentence, does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner attacks the constitutionality of the Pennsylvania Mandatory Minimum Sentencing Act, 42 Pa. C.S. § 9712 as violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

The Pennsylvania Mandatory Minimum Sentencing Act does not violate the due process clause of the Fourteenth Amendment to the United States Constitution. Due process of law is not offended when courts accede to the authority of the legislature to mold an appropriate statutory scheme for the administration of sentencing.

This Honorable Court has previously had the occasion to uphold the constitutionality of this statute as it pertains to due process. *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S. Ct. 2411 (1986).

The Pennsylvania Supreme Court in the case of *Commonwealth v. Wright,* 494 A.2d 354 (Pa. 1985), addressed the constitutional challenge pertaining to due process of the Mandatory Minimum Sentencing Act, 42 Pa. C.S. § 9712 as follows:

> The effect of Section 9712 is merely to limit the discretion of the sentencing court in the selection of a minimum sentence where it is determined that a defendant visibly possessed a firearm during the commission of the crime. The maximum permissible term of imprisonment remains unaffected. The defendant has no cognizable right to leniency. Thus, although a finding that this particular sentencing factor is present may have serious consequences for the defendant, we do not believe that a defendant subject to a Section 9712 proceeding is in a position significantly distinguishable from that of other convicted defendants during the sentencing phase.

Therefore, this Honorable Court should not grant this petition for a writ of certiorari pursuant to Rule 17-1(c) as both the Pennsylvania state courts and this Court have decided the question of federal law currently at issue. No new issue of importance is presented by this petitioner.

Petitioner asserts that Pennsylvania's Minimum Mandatory Sentencing Act ignores the premise of individualized sentencing (Petitioner's Brief, 25). This simply is not true. Pennsylvania's Mandatory Minimum Sentencing Act does not unlawfully preclude individualized sentencing and therefore does not violate due process. *Commonwealth v. Cooke,* 342 Pa. Super. 58, 492 A.2d 63 (1985). Clearly, the judicial branch of our government fixes a sentence once an individual has been convicted; however, the fixing of penalties for crimes is a task for the legislative branch of government, and as one of its powers, the legislature can prescribe a mandatory minimum term of incarceration. *Cooke, supra.* Due process of law is not violated when courts accede to the legislature's authority to frame a coherent statutory scheme for the administration of sentencing for certain criminal offenses.

Commonwealth v. Hernandez, 339 Pa. Super. 32, 488 A.2d 293 (1985).

The two crucial indicators concerning the imposition of punishment in our society are jury determinations and legislative enactments. *Woodson v. North Carolina,* 428 U.S. 297 (1987).

Due process is not violated simply because the legislature has seen fit to provide sentencing courts with additional guidance in the form of mandatory sentencing. *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S. Ct. 2411 (1986). This Court, in reviewing the statute currently before it, concluded that there is "no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line." *McMillan, supra* at 2419.

Petitioner relies on *Commonwealth v. Pittman,* 528 A.2d 138 (Pa. 1987) for the assertion that the sentencing provisions of 42 Pa. C.S.A. § 9712 do not apply absent the filing of notice by the Commonwealth of its intention to proceed under this provision (Petitioner's Brief, 26). Respondent finds this argument curious for the following reasons: first, as conceded by petitioner, the District Attorney did provide petitioner with notice of the Commonwealth's intention to proceed with the mandatory sentence and secondly, the Pennsylvania Supreme Court in *Pittman* found the discretionary authority of the District Attorney to be constitutionally permissible. *Pittman, supra* at 142.

In *Commonwealth v. Parker White Metal Co.,* 512 Pa. 74, 515 A.2d 1358 (1986), the Supreme Court of Pennsylvania upheld two sections of the Solid Waste Management Act which proscribed identical conduct but provided for different penalties thus allowing the prosecutor to choose which section he wished to proceed under:

[T]his Court has consistently upheld, against due

> process challenges the authority of a prosecutor to choose between procedures and sentencing alternatives: In *Brunwasser v. Fields*, 487 Pa. 283, 409 A.2d 352 (1979) (upholding prosecutor's discretion as to whether to seek forfeiture or prosecution of candidate or public official under the Election Code); *Commonwealth v. Wade*, 402 A.2d 1360 (1979), (upholding prosecutor's discretion as to whether to prosecute defendant in a juvenile proceeding or as an adult offender).

Parker, supra at 142.

In *Commonwealth v. Lutz*, 508 Pa. 297, 495 A.2d 928 (1985), the Supreme Court of Pennsylvania upheld the prosecutor's discretion to decide whether or not to recommend a defendant who has been charged with drunken driving for the Accelerated Rehabilitative Disposition (ARD) program.

This Honorable Court in *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) upheld a statutory scheme in which two federal statutes prohibited the same criminal activity, but provided for different terms of imprisonment. This Court rejected the lower court's view that allowing the prosecutor to choose which of the two statutes he wished to proceed under allowed a prosecutorial selection of penalties and, therefore, the possibility of unequal justice. *Pittman, supra* at 142.

A prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the equal protection or due process clause. *Batchelder, supra.*

Therefore, Pennsylvania's Mandatory Minimum Sentencing Act does not violate due process as it does not constitute an abuse

of discretion on behalf of the prosecutor.

As your Honorable Court is aware, recent years have produced statutes which provide an automatic and mandatory five year sentence for someone who uses or carries a weapon during the commission of certain federal felonies. *United States v. Belgard,* 694 F. Supp. 1488 (D. Or. 1988). In *Belgard*, the court held that Congress, consistent with the demands of due process, can mandate a specified sentence in a given case. *Belgard, supra* at 1494.

A defendant has no substantial right to a particular sentence within the range authorized by statute. *Gardner v. Florida,* 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977). The sentence given to petitioner is authorized by Pennsylvania's statute governing crimes committed with a firearm. As stated in 1 Pa. C.S.A. §§ 1921 and 1922:

> (a) the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions . . . Further, the legislature delineated its intentions when passing legislation.
>
> Section 1922. Presumptions in Ascertaining Legislative Intent
>
> (2). That the General Assembly intends the entire statute to be effective and certain.
>
> (3) That the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth . . .

A statute will not be declared unconstitutional unless its violation of the Constitution is so clear, palpable and plain as to preclude doubt or hesitation as to its validity. *Snider v. Thornbush*, 496 Pa. 159, 436 A.2d 593 (1987); *Commonwealth v. Bryant*, 239 Pa. Super. 153, 361 A.2d 350 (1976).

Federal courts also give great deference to legislative acts: ruling on the constitutional challenge to an Act of Congress is the gravest duty which can confront a judge. *United States v. Belgard*, 694 F. Supp. 1488 (D. Or. 1988). The courts accord "great weight to the decisions of Congress". *Columbia Broadcasting Sys. Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 93 S. Ct. 2080, 2086, 36 L. Ed. 2d 772 (1973).

In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133 (1980), this Court expressed a reluctance to review legislative mandated terms of imprisonment.

This Honorable Court has previously deferred to the legislature of the Commonwealth of Pennsylvania by finding the present issue before the Court to be constitutional. *McMillan v. Pennsylvania, supra.*

Therefore, this Honorable Court should deny and dismiss the petition for writ of certiorari challenging the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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